

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 UNITED STATES OF AMERICA,
5 Plaintiff,
6 v.
7 CONSTANTIN OCHESCU, et al.,
8 Defendants.
9

Case No. 2:15-cv-02424-APG-GWF

**ORDER GRANTING UNITED
STATES' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

(ECF No. 39)

10 Plaintiff United States of America brought this action to reduce federal tax liabilities to
11 judgment and to foreclose tax liens on real property. The motion before me involves a dispute in
12 lien priority on the subject property between the United States and defendant Republic Services,
13 Inc.

14 **I. BACKGROUND**

15 Defendant Constantin Ochescu owes over \$600,000 in federal income taxes. ECF No. 1 at
16 3. Ochescu owned property located at 8064 Cetus Circle in Las Vegas. *Id.* He married defendant
17 Liliana Cosma in 2006. *Id.* Property owners like Ochescu and Cosma are required by Clark
18 County Municipal Code 9.04.240(a) to subscribe to Republic's trash collection service. Ochescu
19 and Cosma did not pay their bills from Republic, resulting in Republic recording eighteen liens
20 against the Cetus Circle property. Five of those liens were recorded with the Clark County
21 Recorder before the first IRS tax lien was assessed in December 2005. Despite the unpaid bills,
22 Republic is required to continue its trash collection service as a matter of public health and
23 welfare.

24 On December 29, 2006, Ochescu conveyed his interest in the property to himself and
25 Cosma as joint tenants. On April 6, 2007, the IRS recorded a notice of federal tax lien. On
26 March 23, 2011, Ochescu and Cosma conveyed the property to Cosma as her sole and separate
27 property. The IRS recorded additional notices of tax liens for different tax years on February 7,
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1 2013 and May 29, 2015. The IRS recorded a nominee notice of federal tax lien against Cosma on
2 November 4, 2015.

3 The IRS then brought this lawsuit, seeking to reduce the tax assessments against Ochescu
4 to judgment, to adjudicate Cosma as Ochescu's nominee or fraudulent transferee, and to foreclose
5 its liens on the Cetus Circle property. The IRS joined as defendants Ditech Financial, LLC and
6 Republic because those entities may claim a right or interest in the property.

7 The United States now moves for partial summary judgment against Republic to
8 determine the relative priority of Republic's liens on the property for unpaid trash collection bills.
9 The United States contends that as between the IRS liens and Republic's liens, the IRS liens have
10 priority because they arose with the first assessment on December 26, 2005, and all of Republic's
11 liens were either recorded later or were inchoate on that date. The United States thus argues its
12 liens are superior under federal law and that state law does not make Republic's liens superior,
13 nor could it without violating the Supremacy Clause. The United States also argues Republic's
14 liens cannot remain on the property after the IRS conducts a foreclosure sale on its superior liens.
15 The United States thus seeks a ruling that its liens are superior to Republic's and that the property
16 may be sold free and clear of Republic's liens.

17 Republic opposes, arguing that under Nevada law its liens are superior to Ditech's, and
18 Ditech's lien is superior to the IRS's, so Republic's lien must be superior to the IRS's. Republic
19 contends that under Nevada Revised Statutes § 444.520, it has a perpetual superior lien that is not
20 subordinated to federal tax liens. Republic argues that allowing the property to remain subject to
21 Republic's liens following the IRS's foreclosure sale does not run afoul of federal law or the
22 Supremacy Clause.

23 **II. ANALYSIS**

24 The relative priority of a federal lien for unpaid taxes is governed by federal law. *United*
25 *States v. Equitable Life Assur. Soc. of U.S.*, 384 U.S. 323, 330 (1966). Liens for unpaid federal
26 taxes do not automatically take priority over other liens. *U.S. By & Through I.R.S. v. McDermott*,

1 507 U.S. 447, 449 (1993). Rather, where Congress has not specifically expressed its intention,¹
2 the relative priority of a federal tax lien as against a lien created under state law is determined by
3 the “general rule that ‘the first in time is the first in right.’” *In re Kimura*, 969 F.2d 806, 813 (9th
4 Cir. 1992) (quoting *United States v. City of New Britain*, 347 U.S. 81, 85 (1954)). The priority of
5 a lien created under state law “depends on the time it attached to the property in question and
6 became choate.” *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 88-89 (1963) (quotation
7 omitted). A choate state law lien takes priority over a later-assessed federal tax lien, but an
8 inchoate state law lien does not, even if it was recorded first. *Id.*

9 “A state-created lien is not choate until the ‘identity of the lienor, the property subject to
10 the lien, and the amount of the lien are established.’” *United States v. Kimbell Foods, Inc.*, 440
11 U.S. 715, 721 (1979) (quoting *New Britain*, 347 U.S. at 84); *Pioneer Am. Ins. Co.*, 374 U.S. at 89
12 (“The federal rule is that liens are perfected in the sense that there is nothing more to be done to
13 have a choate lien—when the identity of the lienor, the property subject to the lien, and the
14 amount of the lien are established.” (quotation omitted)). “Failure to meet any one of these
15 conditions forecloses priority over the federal lien, even if under state law the nonfederal lien was
16 enforceable for all purposes when the federal lien arose.” *Kimbell*, 440 U.S. at 721.

17 Whether a lien created under state law is sufficiently choate to take priority over a federal
18 tax lien is a question of federal law. *United States v. Sec. Trust & Sav. Bank of San Diego*, 340
19 U.S. 47, 49-50 (1950) (“[A]lthough a state court’s classification of a lien as specific and perfected
20 is entitled to weight, it is subject to reexamination by this Court.”). But “if the state court itself
21 describes the lien as inchoate, this classification is practically conclusive.” *Id.* at 49-50 (quotation
22 omitted).

23 The identity of the lienor, the property subject to the lien, and the lien amount must be
24 “definite, and not merely ascertainable in the future by taking further steps” *U.S. for Use &*
25 *Benefit of Consol. Elec. Distrib., Inc. v. J.D. Grainger Co.*, 945 F.2d 259, 263 (9th Cir. 1991)

27 ¹ Republic does not argue that its liens fall within any of the statutorily identified liens that would
28 take priority over a federal tax lien. See 26 U.S.C. § 6323.

1 (quotation omitted). Thus, a general lien that is “effective to protect the lienor against others than
2 the Government” does not take priority over a federal tax lien if it is “contingent[] on taking
3 subsequent steps either for giving public notice of the lien or for enforcing it.” *People of State of*
4 *Ill. ex rel. Gordon v. Campbell*, 329 U.S. 362, 374-75 (1946). As a result, recording a lien may
5 not be sufficient to defeat priority of a federal tax lien if the state law lien “does not have the
6 required degree of specificity and perfection.” *Id.* “It is not enough that the lienor has power to
7 bring these elements, or any of them, down from broad generality to the earth of specific
8 identity.” *Id.* at 375.

9 For example, a state attachment lien is not sufficiently choate to take priority over a
10 federal tax lien where the property subject to the lien is attached before the federal tax lien arises
11 but final judgment on the attachment lien is not entered until after the federal tax is assessed. *See*
12 *United States v. Acri*, 348 U.S. 211, 213-14 (1955); *Sec. Trust & Sav. Bank of San Diego*, 340
13 U.S. at 50; *United States v. Dishman Indep. Oil, Inc.*, 46 F.3d 523, 527 (6th Cir. 1995). Because
14 the amount of the state law lien is not established until final judgment is entered, it is not
15 sufficiently choate to take priority over the federal tax lien. *See Acri*, 348 U.S. at 214 (“We hold
16 here that the attachment lien in Ohio is for federal tax purposes an inchoate lien because, at the
17 time the attachment issued, the fact and the amount of the lien were contingent upon the outcome
18 of the suit for damages.”).

19 The test for choateness or perfection also requires that the creditor have the right to
20 summarily enforce its lien. *See United States v. Vermont*, 377 U.S. 351, 359 (1964) (holding the
21 state’s assessment was choate where the “assessment is given the force of a judgment, and if the
22 amount assessed is not paid when due, administrative officials may seize the debtor’s property to
23 satisfy the debt” (quotation omitted)); *Sec. Tr. & Sav. Bank of San Diego*, 340 U.S. at 51 (stating
24 it “has never been held sufficient to defeat the federal priority merely to show a lien effective to
25 protect the lienor against others than the Government, but contingent upon taking subsequent
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1 steps for enforcing it”); *id.* at 52, Jackson, J., concurring (“The history of this tax lien statute
2 indicates that only a judgment creditor in the conventional sense is protected.”).²

3 The amount of unpaid federal taxes constitutes a lien in the United States’ favor on “all
4 property and rights to property, whether real or personal, belonging to” the person who failed to
5 pay. 26 U.S.C. § 6321. That lien arises “at the time the assessment is made” 26 U.S.C.
6 § 6322. Here, the first IRS lien arose on December 26, 2005, when the first assessment was
7 made. ECF No. 39-2 at 3. Additional liens arose on April 19, 2010, June 28, 2010, December 5,
8 2011, August 6, 2012, August 4, 2014, and on March 9, 2015. ECF Nos. 39-4; 39-5; 39-6; 39-10.

9 Republic has been providing services to the Cetus Circle property since July 1999. ECF
10 No. 41 at 17. Ochescu and Cosma collectively owe \$7,778.61 for unpaid bills relating to
11 Republic’s services. *Id.* Republic recorded its first notice of claim of lien in October 2000. *Id.* at
12 49. It thereafter recorded seventeen additional notices. *Id.* at 30-47. Each notice identifies
13 Republic as the lienor, the Cetus Circle real estate as the property subject to the lien, and the
14 amount of the lien. Five of the notices predate December 26, 2005. *Id.* at 40-44.

15 Republic’s liens arise under Nevada state law. Pursuant to Nevada Revised Statutes
16 § 444.520(3), until paid, charges for Republic’s services constitute:

17 a perpetual lien against the property served, superior to all liens, claims and titles
18 other than liens for general taxes and special assessments. The lien is not
19 extinguished by the sale of any property on account of nonpayment of any other
20 lien, claim or title, except liens for general taxes and special assessments. The lien
may be foreclosed in the same manner as provided for the foreclosure of
mechanics’ liens.

21 Foreclosure of a mechanic’s lien entails commencement of a court action. Nev. Rev. Stat.
22 § 108.239(1). Additionally, Republic must file a notice of a pendency of the action, cause a
23 notice of foreclosure to be published in a newspaper for three successive weeks, and mail notice
24 to any other recorded lien claimants. *Id.* §§ 108.239(2), (4). Thereafter, others who hold or claim

27 ² See also *Minn., Dep’t of Revenue v. United States*, 184 F.3d 725, 728-29 (8th Cir. 1999); *Monica*
28 *Fuel, Inc. v. IRS*, 56 F.3d 508, 512-13 (3d Cir. 1995).

1 a notice of lien may join in the action. *Id.* § 108.239(3). The court then must hear and determine
2 the claims and enter judgment regarding the relative rights of the parties. *Id.* § 108.239(7).

3 Republic's liens are inchoate under federal law because they are not summarily
4 enforceable. Rather, Republic must institute a judicial proceeding, provide notice, and have its
5 rights adjudicated in relation to any competing claims. These acts are not merely ministerial. *See*
6 *Minn., Dep't of Revenue v. United States*, 184 F.3d 725, 730 (8th Cir. 1999). Republic does not
7 dispute that its liens are not summarily enforceable.

8 Instead, Republic relies on Nevada state law to argue its liens are superior. However, a
9 state cannot "impair the standing of the federal liens, without the consent of Congress." *New*
10 *Britain*, 347 U.S. at 84. Additionally, the property does not remain subject to Republic's liens
11 following foreclosure of a federal tax lien because foreclosure of a senior lien extinguishes all
12 junior liens. *See McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 123 P.3d 748, 752
13 (Nev. 2005); Restatement (Third) of Property (Mortgages) § 7.1 ("A valid foreclosure of a
14 mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being
15 foreclosed and whose holders are properly joined or notified under applicable law.").

16 Republic contends that application of federal law is "confusing and unworkable" because
17 Republic's lien is superior to Ditech's, Ditech's is superior to the United States', so the United
18 States cannot be superior to Republic. ECF No. 41 at 3. Because the competing priority of Ditech
19 versus the IRS, and Ditech versus Republic are not before me in this motion, I express no opinion
20 on the relative priority of those claims. However, *New Britain* "established a rule for resolving
21 circular priorities." *McKee-Berger-Mansueto, Inc. v. Bd. of Educ. of City of Chicago*, 691 F.2d
22 828, 834 (7th Cir. 1982). "First, the portion of the fund for which federal law creates a lien
23 superior to that of the government's tax lien is set aside." *Id.* Thus, to the extent Ditech's lien is
24 superior to the federal tax lien, the amount necessary to satisfy that lien would be set aside. Next,
25 the United States' lien would be paid out of the remainder (if any). *Id.* Finally, the portion
26 reserved at the first step plus any amount remaining after the IRS lien is satisfied would be
27 distributed according to the state law rules of priority as between Ditech and Republic. *Id.*
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1 This resolution to the circular priority problem also addresses Republic's policy argument
2 that it should not be forced to provide service even when bills go unpaid yet have its lien
3 subordinated to a federal tax lien. To the extent Republic is superior to Ditech, it may yet get
4 paid on its liens. Additionally, Republic could have foreclosed on at least some of its liens before
5 the federal tax was assessed, but it chose not to do so. Finally, Republic concedes that under
6 § 444.250, its lien would be subordinate to Nevada state taxes and special assessments. Republic
7 offers no explanation why it is able to operate with the prospect of its liens being subordinated to
8 Nevada state taxes but not to federal taxes.

9 In sum, I grant the United States' motion for partial summary judgment. Republic's liens
10 are inchoate and thus subordinate to the United States' tax liens, and the property will not be
11 subject to Republic's liens after the United States forecloses on its liens.

12 **III. CONCLUSION**

13 IT IS THEREFORE ORDERED that plaintiff United States of America's motion for
14 partial summary judgment (**ECF No. 39**) is **GRANTED**. Defendant Republic Services, Inc.'s
15 liens are subordinate to the United States' tax liens and the property will not be subject to
16 Republic's liens following the United States' foreclosure on its liens.

17 DATED this 24th day of August, 2017.

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21 ANDREW P. GORDON
22 UNITED STATES DISTRICT JUDGE
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